Supreme Court, U. S.
FILED
AUG 30 1977
MICHAEL RODAK, JR., CLERK

No. 76-1731

In the Supreme Court of the United States

OCTOBER TERM, 1977

GEORGE RAYMOND DYBA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

MICHAEL W. FARRELL,
JOHN J. KLEIN,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1731

GEORGE RAYMOND DYBA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. iv-xiii) is reported at 554 F. 2d 417.

JURISDICTION

The judgment of the court of appeals was entered on May 6, 1977. The petition for a writ of certiorari was filed on June 6, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the trial judge coerced the jury by giving a modified *Allen* charge in response to the jury's statement that it was deadlocked after three and one-half hours of deliberation, and by subsequent remarks following a

jury request and when releasing the jury for overnight recess.

STATEMENT

Following a jury trial in the United States District Court for the Western District of Oklahoma, petitioner was convicted of burglary of a federally-insured bank, in violation of 18 U.S.C. 2113(a).[1] He was sentenced to 15 years' imprisonment and a $2,500 fine. The court of appeals affirmed (Pet. iv-xiii).

1. The evidence, summarized in the court of appeals' opinion, showed that petitioner and three confederates burglarized a bank in Meeker, Oklahoma, during the early morning hours of January 29, 1973. On the evening before the robbery, petitioner flew to Oklahoma City where he joined Prentiss Kirkland, Paul Bates, and Robert Krogness. The group then drove to Meeker (Tr. 262-264, 275-278). While Krogness waited outside of town in a car, petitioner, Kirkland, and Bates broke into a garage near the bank and stole oxygen tanks and an acetylene torch, which they carried to the bank (Tr. 266, 278-279). Petitioner and Kirkland then entered the bank, while Bates positioned himself on the roof; communications among the three men were maintained by two-way radios. Petitioner cut a hole in the top of the safe with the acetylene torch and removed the money (Tr. 265-267).

During the burglary, a barber who was in his shop across the street from the bank observed petitioner and

[1]Petitioner was acquitted on a second count charging theft of government property, in violation of 18 U.S.C. 641. A prior trial for the same offenses had resulted in a mistrial when the jury was unable to reach a verdict.

one associate in front of the bank and later saw Bates on the rooftop (Tr. 28-29). The barber notified another Meeker resident, who summoned the county sheriff and other law enforcement officers; they arrived at the bank while the burglary was in progress (Tr. 29-30, 75-76). Following police gunfire, petitioner and his two accomplices were apprehended as they fled from the bank (Tr. 42-44, 76-77, 83-84). While petitioner was being searched for weapons by the county sheriff, he jumped into the sheriff's automobile and drove away. The sheriff, clinging to the side of the automobile, fired one shot at petitioner before being thrown to the ground as the car turned a corner at high speed (Tr. 47-50). When the sheriff's car was recovered outside of town several hours later, a bullet was removed from the windshield and three napkins soaked in blood of petitioner's blood type were recovered from the interior of the car (Tr. 100-102, 167-171). Petitioner was apprehended over two and one-half years later in Billings, Montana (Tr. 175-178).

Kirkland identified petitioner as the burglar who had escaped in the sheriff's car. Both the sheriff and a private citizen who had viewed the third burglar as he was being ing frisked testified that petitioner resembled the burglar (Tr. 50, 65-66).

2. After deliberating for approximately an hour on the day it received the case for submission and for over two hours the following day, the jury informed the court that it was deadlocked and desired further assistance. The court responded by reading a modified *Allen*[2] instruction (Tr. 486-493). Petitioner's counsel did not object to the charge (Tr. 493). Three hours later the

[2]See *Allen* v. *United States*, 164 U.S. 492.

jury asked that the testimony of certain witnesses be re-read. The court refused this request and added, *inter alia*, the following statement (Tr. 496):

> But we've got all day today, we've got all day tomorrow, we can work on Saturday, probably could take a recess on Sunday; but this case must be decided if at all possible, and I say if at all possible, by this jury. It has been tried once. People have gone to all the expense they have gone to, the time, the work, the trouble.

Defense counsel did not object to the court's comment (Tr. 497). Two hours later, when it released the jury for the day at 4:40 p.m., the court mentioned the possibility of sequestering the jury if it had not reached a verdict after the next day's deliberation (Tr. 498).[3] Again defense counsel did not object to the trial court's remark (Tr. 499).

ARGUMENT

Petitioner contends that the trial judge erred in giving a modified *Allen* charge and that the court's additional

---

[3]The court's remarks were as follows (Tr. 498):

> The Court would suggest to you that you might come prepared to spend the night. The Court may decide to sequester you tomorrow night, which means to keep you in a hotel some place, keep you together until we reach a verdict in this case. I am not saying we will, but it's altogether possible that we will. As you know, this case is on for the second time; and it seems to me that it's not so difficult, or the evidence so varied that the jury can't some way, some how arrive at a verdict.
>
> As I said before, the cost of retrying it, it's expensive, and the delay, and the work—it's a job that the jury took when you took the case; so if you will, it is my suggestion that you be prepared to be sequestrated at night, tomorrow night.

remarks coerced the jury by conveying the false impression that it had an absolute duty to arrive at a verdict (Pet. 7-8). In particular, petitioner challenges the trial judge's references to the expense of the instant trial (Pet. 8-9), to the fact that a previous jury had also been unable to reach a verdict on the same charges (Pet. 10), to the fact that the jury had the testimony of a witness who had not testified at the earlier trial (Pet. 11-12), and to the possibility of sequestering the jury if it did not reach a verdict after an additional day of deliberation (Pet. 13-14).

Since petitioner did not object at trial either to any portion of the *Allen* instruction or to the court's related comments, he may not assign these matters as error on appeal unless they constitute plain error. At the time the instruction was given, petitioner stood to gain as much as he did to lose from it. No one knew how the jurors were divided, and petitioner's failure to object may well have been a strategic decision, made in the hope that, if the instruction did have a coercive impact, it would benefit him. By foregoing an objection he preserved the possibility of this benefit; he thereby waived the right to raise the matter on appeal. See *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977 ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court" (slip op. 8).).

In any event, as the court of appeals correctly concluded (Pet. xi), the supplemental charge and subsequent comments "were not prejudicial and did not constitute plain error." To determine whether the trial court's *Allen* charge or subsequent comments coerced the jury, both the trial court's language and the facts and circumstances forming the context for the court's remarks must be examined. *Jenkins* v. *United States*, 380 U.S. 445; *United States* v.

Cheramie, 520 F. 2d 325, 328-332 (C.A. 5); *United States* v. *Winn*, 411 F. 2d 415, 416-417 (C.A. 10), certiorari denied, 396 U.S. 919. We submit that such an examination shows that the *Allen* charge and subsequent comments did not coerce the jury.

The court gave the supplemental charge after the jury had deliberated for more than three hours without a verdict and had specifically requested guidance from the court. In its charge, the court, while stating *inter alia* that this case, "[l]ike all cases, * * * must be disposed of" and that there was "no reason to believe [it] would ever be submitted" to a jury upon additional evidence or to more competent jurors (Tr. 487-488), balanced this language by cautioning—as it had in its original charge (Tr. 479)—that the verdict must reflect the decision of each individual member of the jury and that the jury was to reach a verdict only if each juror could do so without harm to his own individual judgment (Tr. 488, 490). The court further emphasized that each juror, majority as well as minority, should reexamine his views in light of the differing opinions of fellow jurors (Tr. 489-490), and it underscored—as it had earlier (Tr. 466, 467, 472, 475)—the government's burden of proving guilt beyond a reasonable doubt (Tr. 490-491). These instructions, while reminding the jury of its task to reach a verdict if possible, were ample protection against the danger that it would perceive the court's charge as requiring a guilty verdict. See *United States* v. *Cheramie, supra*, 520 F. 2d at 331; *Munroe* v. *United States*, 424 F. 2d 243, 245-247 (C.A. 10); *United States* v. *Angiulo*, 485 F. 2d 37 (C.A. 1).

The court's later suggestion that continued inability of the jury to reach a verdict might necessitate sequestration cannot fairly be interpreted as a coercive threat

that the jury would be exposed to exhausting deliberations until it reached a verdict. The court's actions had made it plain that it intended the periods of deliberation to be reasonable; it released the jury at 5:33 p.m. on the first day of deliberation and at approximately 4:40 p.m. on the second day (Tr. 484, 497-499). Moreover, the court made the comment in question less than two hours after having assured the jury that it could take several more days to evaluate the evidence, would probably be allowed to recess on Sunday if a verdict had not been reached by then, and could "be as leisurely in [its] deliberations as the occasion may require, and * * * [should] take all the time which [it] may feel reasonably necessary" (Tr. 491, 495). These instructions belie petitioner's claim that the court intended to rush the jurors into an agreement.

Nor were the court's other comments, viewed in the context of the cautionary instructions noted above, so prejudicial as to warrant reversal in the absence of petitioner's objection. The court, although mentioning that the jury—unlike the jury at petitioner's previous trial—had had the benefit of the testimony of Kirkland, expressed no opinion as to the nature or credibility of Kirkland's testimony, stating merely that the jury should consider it "for what it's worth" (Tr. 487). Similarly, the court's remarks concerning the cost of the trial and of petitioner's previous trial emphasized that this was a burden both sides had to bear (Tr. 487) and told the jury no more than what it undoubtedly already knew—that criminal litigation is expensive to both the government and the defendant. In short, these remarks did not lead the jury to disregard the court's prior instructions to deliberate slowly and thoroughly and to arrive at a verdict only if each juror could conscientiously do so.

Finally, the timing and nature of the verdict confirms our view that the court's comments did not prejudice petitioner's rights. Following its final communication from the court, the jury was allowed to separate and recess overnight. Upon reconvening the next morning, the jury did not rush to agreement, but returned its verdict after several additional hours of deliberation (Tr. 500). Moreover, the jury's acquittal of petitioner on one of two counts of the indictment reflects substantial discussion among the jurors on each aspect of the case rather than hasty and coerced agreement.

In sum, the trial court's supplemental charge and subsequent comments to the jury did not pressure minority jurors to abandon their conscientiously held views or suggest that the jurors had an absolute duty to decide the case. The instructions were not calculated to coerce the jury into agreeing on a verdict and did not constitute plain error affecting petitioner's substantial rights. Rule 52(b), Fed. R. Crim. P.[4]

---

[4]Petitioner suggests that this Court should resolve an apparent conflict among the courts of appeals regarding the validity of the traditional *Allen* charge. Four courts of appeals, in the exercise of their supervisory powers, have held that the *Allen* charge should not be given unless substantially modified. See *United States* v. *Angiulo*, *supra*; *United States* v. *Thomas*, 449 F. 2d 1177 (C.A. D.C.); *United States* v. *Fioravanti*, 412 F. 2d 407 (C.A. 3), certiorari denied *sub nom. Panaccione* v. *United States*, 396 U.S. 837; *United States* v. *Brown*, 411 F. 2d 930 (C.A. 7), certiorari denied, 396 U.S. 1017. (The Tenth Circuit continues to approve the *Allen* charge with minimal modification. *United States* v. *Smith*, 521 F. 2d 374, 376-377 (C.A. 10); *Munroe* v. *United States*, *supra*, 424 F. 2d at 245-247.) But no court of appeals has held that the *Allen* charge in its traditional form violates any constitutional right. Moreover, all the courts of appeals have agreed that some form of supplemental instruction may appropriately be given to a jury experiencing difficulty in reaching a unanimous verdict. The differences among the courts of appeals reflect an ongoing reexamination of the precise wording of a proper supplemental instruction, and do not warrant review by this Court. Indeed, the Court has recently denied certiorari in several other cases presenting a similar issue. *E.g.*, *Perez-Vega* v. *United States*, No. 75-5937, certiorari denied, 424 U.S. 970; *Lee* v. *United States*, No. 74-6345, certiorari denied, 422 U.S. 1044.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

BENJAMIN R. CIVILETTI,
Assistant Attorney General.

MICHAEL W. FARRELL,
JOHN J. KLEIN,
Attorneys.

AUGUST 1977.

DOJ-1977-08